

Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE REGULATION OF RENTS

THAT the housing question is fraught with serious social and economic possibilities is attested by the anxious attention given it in many parts of the country There seems to be a consensus of opinion that the situation is not one that can be left to solve itself.[1] In normal times, the natural operation of economic forces suffices to provide, in this as in other fields, a supply more or less correspondent with the need, and thus tends to maintain a reasonable price level. But the present situation is not normal. It is on the contrary a continuance of the essentially abnormal conditions of the war. This is but another illustration of the truth that the war is over only in the sense that actual fighting has ceased on the front. In every other sense, we are still struggling with the social and economic difficulties, dislocations and disorganizations which were the inevitable consequences of concentrating the Nation's whole energies upon the single task of waging a war.

This is obvious in the District of Columbia, where the vast expansion of Government activities and functions could not come to a sudden end with the cessation of hostilities. But it is equally true of other congested centers of population. In New York City, in particular, the situation has assumed the proportions of a crisis. The State Assembly is now in special session for the purpose of dealing with this one problem.

Manifestly an acute shortage in houses, like a shortage in anything else, can be relieved only by new construction. But under the most favorable circumstances that is a process which requires time. Under circumstances such as have existed for the last few years and still exist in the great cities, construction of buildings for habitation is so limited as to be practically without effect on the existing supply. Meanwhile, the urgency of the demand for this fundamental human necessary offers such opportunities for exploitation that society seems un-

[1] See ARONOVICI, HOUSING AND THE HOUSING PROBLEM; Chicago, 1920.

willing to leave the matter to the unrestricted play of individual economic interest.

The legislation embodying this belief has taken two main forms. The first type is represented by the District of Columbia Rents Law, passed by Congress in connection with certain amendments of the Food Control (Lever) Act.[2] The other type is represented by the series of acts passed by the New York Assembly in the spring of 1920. Legislation of the first type acts primarily through a Commission empowered to determine and fix just and reasonable charges for the use of rented property. The second type operates directly through the courts. The New York Acts, for example, make the fact that a rent is unjust and unreasonable a defense to an action for its recovery, and further lay down the rule that an increase of more than 25% over the rent existing a year before shall be presumptively unreasonable and oppressive. In order to avail himself of summary proceedings for possession, the landlord is required, under another act of the same series, to prove that the rent demanded is no greater than the amount paid for the month preceding the default, or has not been increased more than 25% over the rent existing a year prior to the suit.[3]

Thus the New York legislation differs from legislation of the Commission type in two important particulars: First, in fixing, by way of presumption, a definite percentage of permissible increase for the individual case; second, in making the determination of a reasonable rent incidental to the exercise of a court's judicial function in respect of the recovery of debts and the restitution of possession.

Although both types of legislation rest upon a common principle—the existence of a public interest in the landlord and tenant relation arising from the distressing conditions prevailing in congested centers of population—it seems likely that the Commission method, rather than the other, will be followed in any future development in this field. For that reason, and also because a concrete statute furnishes the best object for

[2] Act of October 22, 1919, 41 Stat., c. 80, p. 298.
[3] Chapters 136 and 139 of the Acts of 1920.

study, it has seemed advisable to take, as a basis for inquiry into the general question of rent regulation, the Act of Congress, which, so far, is the most comprehensive and complete law on that subject, and which has already served as a model for some State legislation.[4]

Analysis of the Act.

The District Rent Act, unlike most modern legislation, embodies in its text an express statement of the circumstances which occasioned its enactment.

> "Sec. 122. It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war * * * resulting in rental conditions * * * dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District, and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of public business."

This declaration is, in effect, an express finding of fact by the Grand Inquest of the Nation. It is a legislative determination of the conditions which it recites. The legislation predicated upon it must be dealt with upon that basis.[5]

The statute divides its subject matter into two distinct, though cognate, classes, viz: (a) rental property other than hotels or apartments, and (b) hotels and apartments. The former is defined to be

> "any building or part thereof or land appurtenant thereto * * * rented or hired and the service agreed or required * * * to be furnished in connection therewith."

Because of the conditions recited in its concluding section, the statute declares the fact to be that both of these classes of property are affected with a public interest. The rule is accordingly laid down that "all rents and charges for the use and oc-

[4] Cf. Wisconsin Laws, Special Session 1920, Chap. 16.

[5] Munn *v.* Illinois, 94 U. S. 113; Withnell *v.* Ruecking Con. Co., 249 U S. 63, 70.

cupancy of such property, all service in connection therewith, and all other terms and conditions of the occupancy thereof" shall be fair and reasonable.

The means by which the statute seeks to protect the public interest thus recognized are threefold:

(1) Having laid down the rule of reasonableness as stated above, the statute confers upon a Commission established for the purpose the power to

> "determine whether the rent, charges, service or other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel or apartment, are fair and reasonable." [6]

The major part of the text of the act is taken up with the details of the machinery and procedure provided for the exercise of this power. These will be examined later. Two features deserve notice here. The power may be exercised either upon the Commission's own initiative or upon complaint made by anv tenant or by any owner, except as against a tenant in possession for a term not yet expired. A determination, once made, remains in force unless abrogated or modified by authority.

In this aspect, it will be observed, the statute operates only upon charges for the use and occupation of the specified classes of property and the terms and conditions of such use. Possession is not affected.

(2) The statute's second mode of operation is in the protection under certain conditions of existing occupancy. Sec. 109 provides:

> "The right of a tenant to the use or occupancy of any rental property, hotel or apartment * * * under any lease or other contract for such use or occupancy * * * shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant, subject, however, to any determination or regulation of the commission relevant thereto."

The protection thus given the existing occupancy of a tenant is subject, however, to an important limitation. The owner

[6] Sec. 106.

of the property has the right to regain possession whenever he *bona fide* desires to occupy it himself or intends to improve it in order to place it again on the rental market.

(3) The statute's third mode of operation is upon remedies. The substantive right to continued use upon payment of reasonable compensation is protected by providing that so long as the tenant "pays the rent and performs the other terms and conditions of the tenancy" as fixed by contract, or as modified by the determination of the Commission, he shall not be evicted or dispossessed.

The suspension of the landlord's ordinary possessory remedies is conditioned by the recognition of the landlord's right to withdraw the property from the rental class. The possessory remedies are open to him, provided he shall have first given notice stating facts which, if true, would bring him within one of the stated exceptions authorizing recovery of possession notwithstanding the occupant's willingness to continue at a fair rent. Any dispute concerning the accuracy of the statement is committed to the determination of the Commission, subject to review by the Court of Appeals,[7] and such determination is made conclusive in any suit "involving any question arising out of the relation of landlord and tenant with respect to" the property in question.[8]

It is important to note that this suspension or modification of existing possessory remedies forms no essential part of the process of regulating rentals. It is connected only with the provisions for continuance of occupancy. While all the provisions of the statute are directed towards the same general legislative purpose, there is no necessary connection between its two main substantive modes of operation. Congress doubtless had this in mind when it provided that the invalidity of one part should not affect the remainder of the act.[9] The regulation of the price properly chargeable for the use of property affected with a public interest neither depends upon, nor requires, the recognition of a right to continue the use beyond the term agreed

[7] Sec. 109.
[8] Sec. 106.
[9] Sec. 121.

upon between the occupant and the owner. Charges may be regulated, although the public has no legal right to demand the service.[10] The rental provisions could very well have formed the subject of an independent act. Congress might have contented itself, (as did the Wisconsin Legislature) with providing means for determining the fairness and reasonableness of rents without touching the owner's right to resume possession at the expiration of a tenancy. There is little advantage in ousting a tenant if a higher rent cannot be exacted of a new one.

Such, in its main features, is the District of Columbia Rents Act, which the Court of Appeals of that District, by a majority of two to one, has declared to be totally void.[11] The case in which this conclusion was announced was one in which the owner of business property, having purchased the reversion shortly before the expiration of an outstanding lease, sued to recover possession upon the expiration of the term, notwithstanding the provisions permitting a tenant to remain subject to any determination of the Rent Commission. No question of fair rent was involved. The sole issue was the right to possession If the primary operation of the act in regulating rents is not dependent upon its secondary operation in protecting occupancy, it would seem that the case did not present for decision, either directly or by necessary implication, the power of Congress to regulate rents or the validity of the provisions directed to that end. The New York statutes, on the other hand, appear to have been sustained by the Appellate Terms of the Supreme Court. Until passed upon by the Supreme Court of the United States, these important constitutional questions must be regarded as still open.

It is quite obvious that the heart of this or any similar statute lies in the *regulation* of rental charges as matters which, under the existing circumstances, have become affected with a public interest. The first and fundamental question, therefore, is whether the legislative body possesses the power of regulation. If that power does not exist, all further discussion is at an end.

[10] German All. Ins. Co. *v.* Kansas, 233 U. S. 389, 407.

[11] Hirsch *v.* Block, 48 Wash. Law. Rep. 378. (Decided June 2, 1920.)

If, however, the power to regulate rents be established, our inquiry will be, secondly, whether the machinery and procedure devised for applying and enforcing the standard of reasonableness satisfy the requirements of due process; and, finally, whether the operation of the statute in respect of the protection of possession (which, as we have seen, is not indispensable to its regulatory operation) may yet be justified as a reasonable corollary of the power to regulate and as an appropriate means of giving it full effect.

1. THE POWER TO REGULATE RENTALS.

There are no fixed categories of property affected with a public interest.[12] The considerations that justify regulatory legislation are too numerous and too manifold to be imprisoned in a formula.[13] Verbal definition being out of the question, the scope of legislative authority in this regard must be left to be worked out, in this as in all other applications of the police power, by the gradual process of inclusion and exclusion.[14]

The broad considerations of public necessity and public welfare upon which rests the power of legislative regulation manifestly vary with the ever-changing conditions of society.[15] Matters which, only a few years ago, were safely left to uncontrolled private activity are now common and habitual subjects of regulation, because, in the meantime, the increasing complexity and inter-dependence of our economic life has so heightened and intensified their reactions upon society as a whole as to make their right conduct an object of direct and positive public concern.

In this way the regulating power, which the common law had been long accustomed to exercise over inn-keepers, wharfingers and common carriers, has been successively extended to grain elevators,[16] to stockyards,[17] to the furnishing of gas, whether

[12] German All. Ins. Co. *v.* Kansas, 233 U. S. 389, 411.

[13] Hudson County Water Co. *v.* McCarter, 209 U. S. 349, 355.

[14] Davidson *v.* New Orleans, 96 U. S. 97, 104; Budd *v.* New York, 143 U. S. 517, 534; Noble State Bank *v.* Haskell, 219 U. S. 104, 112.

[15] Munn *v.* Illinois, 94 U. S. 113, 133.

[16] Budd *v.* New York, 143 U. S. 517, 543.

[17] Ratcliff *v.* Wichita Un. Stockyards Co. (Kan.), 86 Pac. 150, 6 L. R. A. (N. S.) 839.

natural or artificial, for light, heat and power, to the ginning of cotton,[18] to the collection and distribution of news,[19] to employment agencies,[20] to insurance [21] and to banking.[22]

To deny Congress power to regulate rents and conditions of occupancy under the existing situation in the District of Columbia is, in effect, to assert that the police power can never, under any conceivable circumstances, extend to that subject. For if rents be subject to control in any case whatever, the congressional declaration that their regulation at the seat of government is essential to public health and unembarrassed transaction of the public business is conclusive. "We must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed." [23]

Rental Charges Not Inherently Exempt from Regulation.

One cannot help feeling that much of the opposition is due to the mere novelty of the application. Since there is nothing in the nature of real property which precludes its being affected with a public interest, reluctance to admit its possibility in respect of rental charges seems to arise from a half-conscious survival of feudal ideas concerning the relation of landlord and tenant as implying some sort of personal tie between the parties. It is a long time since tenants for years have done fealty,[24] but the notion that the relation is essentially personal seems to linger on in the conception that an owner of real property has an absolute and inherent right to enter into that relation only with such person, upon such terms, during such time, and for such price, as he may choose, immune from the possibility of any regulating control whatever.

This conception of the renting contract as immune from legislative regulation is a palpable anachronism in any great city

[18] Oklahoma Gin Co. *v.* State, 158 Pac. 629.
[19] Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 438, 56 N. E. 822.
[20] Brazee *v.* Michigan, 241 U. S. 340.
[21] German All. Ins. Co. *v.* Kansas, *supra.*
[22] Noble State Bank *v.* Haskell, *supra.*
[23] Munn *v.* Illinois, 94 U. S. 113, 132.
[24] Co. LITT., 67 b, 93 a.

or other highly urbanized community. When the owner of a building designed for human habitation does not use it himself, but offers to exchange its use in return for a money compensation, he becomes, in effect, under the conditions of modern urban life, the purveyor of a commodity which, like food and clothing, is one of the primary necessaries of life. He becomes a vendor of habitation-space. In the relation thus constituted, there is nothing essentially personal. The commodity is offered substantially to all comers, the only condition being payment of the price demanded and acceptance of certain common and usual conditions which custom in each community has reduced to practical uniformity.

Such being the true relation between the parties, it is manifestly impossible to say that the prices to be charged for the exchange of this commodity are exempt by their very nature from all possibility of legislative regulation, no matter what may be the stress of the existing economic situation or the effect upon the operations of Government itself. For it is now well established that real property may, under special circumstances of grave public concern, become so far affected with a public interest that individuals may be permitted to expropriate rights in it for uses which would commonly be regarded as private. Such was the principle applied by the Supreme Court to the Utah statutes, which permit an individual to condemn rights of way over other lands for irrigating his own, or "for tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores."

Clark *v.* Nash [25] established the constitutionality of this legislation in respect of the condemnation of land for the purpose of conveying water in ditches across it to irrigate other land in private ownership. In Strickley *v.* Highland Boy Min. Co.,[26] its validity was sustained in respect of the condemnation of a strip required for an aerial bucket line supported on movable towers for the transportation of ore from a private mine to a railway station. These cases are highly significant here, because both recognize that use by the public at large is not the

[25] 198 U. S. 361.

[26] 200 U. S. 527.

sole or universal test in these matters, and that there are "special times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent." [27]

According to the traditional view, each of these cases was a clear instance of property being taken, not for public, but for private use.[28] Yet the private use under the peculiar conditions there prevailing was, in the judgment of the legislature, so bound up with the welfare, growth and prosperity of the State that the resulting economic advantage, which seemed at first sight merely a private use, was regarded as constituting, in its ultimate effect, a public use.

While those are cases of expropriation and not of regulation, the underlying considerations are the same. If the general welfare can, under special circumstances, become so bound up with the development of a particular industry as to justify the condemnation of the property of one person in order to enable another person more successfully to conduct his business, it is equally manifest that a like power to regulate must exist where the use of certain classes of property is so bound up with the characteristic life of the community and the operations of Government that both will suffer utter disorganization unless fair and stable conditions are maintained in respect of the terms of such use. The public interest which justifies expropriation in the one case must surely justify regulation in the other.

Legislative Recognition of a Public Interest.

When the legislature, to whose judgment the matter is committed, declares that such a situation exists, its declaration cannot be disregarded. This, of course, does not mean that the legislature can, by mere *fiat*, and without reasonable foundation in fact, impress a given form of property or business with a public interest. The legislature does not create the public interest. What it does is to recognize its existence and legislate for its

[27] 200 U. S. 531. [28] 198 U. S. 368.

protection. It is therefore open to the courts to inquire, not indeed whether the legislature is right in its conclusion that a public interest exists and needs protection, but whether there is any rational foundation upon which it might be deemed to exist. In other words, the judicial function here, as in other cases of the delimitation of legislative authority, is to distinguish between that which is palpably arbitrary, irrational and unfounded, and that which may fairly be said to have a basis in reason and social fact, although legislatures and judges might well differ as to the precise conclusions which ought to be drawn from the available evidence.[29]

Congress has declared in the most direct and positive manner that such an exceptional situation does in fact exist in the District of Columbia. Clearly a heavy burden rests upon those who challenge that declaration. It is incumbent upon them, not, indeed, to disprove the existence of conditions which Congress has thus solemnly ascertained and declared, but in effect to establish that no such conditions are rationally conceivable as amounting to a public interest. For no one will now contend that the common law is incapable of applying the concept of public interest wherever new social and economic conditions actually bring such an interest into being.

While, in strict logic, we might well await a demonstration of the baselessness of the legislative declaration and the irrationality of the legislative deduction, we may readily establish, for ourselves, the entire reasonableness of the conviction that such a public interest exists, by simply noting the presence of certain familiar elements which, in the case of other occupations and use of property, have caused them to be recognized as affected with such an interest.

Essential Elements of a Public Interest.

It is first necessary to dispose of two objections which always appear at the threshold of the discussion, namely, (a) that the renting of real property (apart from the bare fact that all rights in land exist by force of the recognition and defini-

[29] Arizona Employers' Liability Cases, 250 U. S. 400, 425, 426.

tion of the law) presents no element of special privilege such as would imply any obligations toward the public; and (b) that the relation of landlord and tenant, so far from involving the satisfaction of any public want of necessity, is essentially inconsistent with the concept of a public use. These are objections which, in one form or another, have been habitually resorted to for the purpose of defeating every new application of the principle of public interest.

The persistent notion that the legislature's power of regulation is in some way dependent upon or connected with the grant of a monopoly or franchise or of some special statutory privilege importing a correlative obligation to the public was long since thoroughly exploded. It never had any real basis in the old common law.[30]

Use by the public was next seized upon as an indispensable element, and wherever the public did not have a legal right to the use, the possibility of a public interest was denied.[31] But that in turn had to be abandoned.[32] For it was found that there were many businesses so directly affecting the public as to require regulation, both of practices and of rates, notwithstanding the offered service was not of that simple and relatively uniform character requisite for a public demand in the ordinary sense. While an immense number of cases, such as the water, gas, telephone, telegraph and transportation cases, involved businesses undertaking to satisfy a more or less general demand, where the service, in the nature of things, must be furnished to all alike without discrimination, the existence of a public interest was not confined to services of that character. Any such test was obviously inapplicable to insurance, where the nature and variety of the risks to be indemnified against clearly exclude the notion of a general public use or demand.[33]

It follows that neither the fact that the landlord's right to

[30] People *v.* Budd, 117 N. Y. 1, 27, 22 N. E. 670; Ratcliff *v.* Wichita Un Stockyards, *supra;* Webster Telephone Case, 17 Neb. 126, 22 N. W. 237. Cf. Edw. A. Adler, "Business Jurisprudence", 28 HARV. L. REV. 135; and "Labor, Capital and Business at Common Law", 29 HARV. L. REV. 241.

[31] Allen *v.* Jay, 60 Me. 124.

[32] German All. Ins. Co. *v.* Kansas, 233 U. S. 389, 407.

[33] German All. Ins. Co. *v.* Kansas, 233 U. S. 389, 411.

rent his property is deemed to exist not as a special privilege but as an incident of the right of use and disposition inherent in ownership, nor the fact that the physical accommodations afforded by houses for rent vary in many particulars, constitutes an insuperable objection to public regulation of the conditions and charges upon which such accommodations are supplied.

It may be remarked in passing that the conception of a general public demand is, after all, somewhat of an illusion. There is never a universal public demand for anything. However extensive it may be, the demand for a particular facility of service is always limited to some definite fraction of the community. This becomes evident as soon as one gets away from things like street-railway transportation, gas-light and electricity, on which large masses of the community are dependent. In most towns, electricity is used only by a small minority. The generality of the demand is clearly a matter of degree. There is a far cry from the street-car to the taxicab. Warehouses and grain-elevators are none the less subject to regulation, because the actual use of their facilities is limited to a small, though important, portion of the business community. Insurance is none the less affected with a public interest because only relatively few individuals avail themselves of it.

This brings us to the main object of our present inquiry. Does the present housing and rental situation in the large cities disclose the distinguishing features—the fundamental elements —found in other cases of public interest?

While, as we have seen, the circumstances giving rise to such an interest are infinitely various and perpetually changing, the condition finally emerging from them is a state of virtual monopoly or, conversely stated, an absence of effective competition. Such a condition, of course, may be the direct result of a franchise or other statutory privilege. But that is not the only, nor the principal origin of monopoly. Where such a privilege is absent, suppression of competition may be the result either of abnormal conditions on the side of supply, or of abnormal conditions on the side of demand. And the existence of such a state of things is not necessarily connected, in the least, with combinations or other arrangements made for the purpose.

1. On the side of supply, it may result from limitations which are natural in the physical sense, as in the case of water, natural gas, etc.[34] Or it may result from limitations which are natural only in the sense that, under the circumstances of a given community, the locations or sites available for the particular purpose are necessarily few and not susceptible of multiplication or enlargement. Competition therefore cannot effectively regulate their use.[35] Such are the grain-elevator and stockyard cases, in which proximity to, or connection with, other transportation facilities is a principal factor. Although in these cases there is no rigid physical limitation as in the case of water or gas, and the creation of new facilities is always theoretically possible, a virtual monopoly ensues, and it becomes necessary to regulate the prices charged by those who enjoy it.

2. But, as we have said, the controlling factor may lie on the side of demand. There may come into existence an immediate and highly intensified demand for some human necessity which, though not itself artificially or naturally limited, cannot be supplied in adequate measure by the usual, normal economic processes. In this case, also, if the necessity is fundamental, if the need is instant, and there is no economic substitute available, a condition of virtual monopoly does in fact ensue.

A familiar everyday instance of this is the classic case of the inn-keeper. Notwithstanding the enormous multiplication of hotels, the law deals with them in the same manner that it dealt with the isolated wayside inn. For the need of the traveler, as has been aptly said,

> "will always be so immediate that, did the law not interfere in his favor, he would pay often an exorbitant price rather than be turned out into the night to seek other accommodations. He has no power to choose, no opportunity to bargain." [36]

3. The public interest arising from the existence of a pressing and instant need naturally receives a powerful extension in

[34] Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 354; Van Dyke *v.* Geary, 244 U. S. 39, 47.

[35] Budd *v.* New York, *supra.*

[36] 1 WYMAN, PUBLIC SERVICE CORPORATIONS, § 106.

all periods of extraordinary economic stress. Such situations exhibit in varying degrees a genuine analogy to the distribution of food among the civilian population in a besieged town, or to take a larger canvas, the control of the distribution of food products and fuel in a country whose economic resources are mobilized for a modern war.[37] In the first case, at least, everyone concedes that regulation of private contract is demanded in the general interest for two obvious reasons: First, that there may be an economical and equitable and, therefore, the most advantageous utilization of the existing stock.[38] Second, that the frightful and constantly accelerating intensity of demand may not generate limitless extortion with its inevitable inequalities, corruptions and oppressions, its attendant physical suffering and mental distress—in a word, that it may not lead to the utter demoralization of the entire population. Whether this may be predicated of the larger as well as the smaller field would seem to be a question of fact. But whether confined to a town under siege or extending to a country mobilized for war, while the first reason may justify regulation of distribution, it is the second that demands limitation of price. Yet, assuming the state of facts to exist, no one would doubt that limitation of price is equally necessary and valid. And the obvious reason is that regulation of price is the most effective corrective of a condition of practical monopoly.

The analogy is not disposed of by saying that the war is over and that we are not here considering the war power. The regulation of rents in the District of Columbia was, indeed, one aspect of the war legislation for the control of food and other necessaries. It was enacted in connection with the Lever Act[39] and was directed, like it, against an existing and temporary emergency.[40] But the rational basis of such legislation is not

[37] United States *v.* Swedlow, 264 Fed. 1016, 1018; Merritt *v.* United States, 264 Fed. 870, 874; United States *v.* Standard Brewery, 251 U. S. 210, 219.

[38] Cf. the bread and bakery cases, Mobile *v.* Yuille, 3 Ala. 137, 141; Schmidinger *v.* Chicago, 226 U. S. 578, 587.

[39] Act of Oct. 22, 1919 (41 Stat., c. 80, p. 297) amending Act of Aug. 10, 1917 (40 Stat., c. 53, p. 276).

[40] "Although an emergency may not call into life a power which has never

explained by ascribing it to the war power. What justifies it as an exercise of legislative power in war but conditions of social fact which, whether arising from that emergency or some other, mark the emergence of a public interest?

These considerations show, we think, that, at bottom, there is one broad basic consideration in all these matters, and, secondly, that the question in any instance is always one of degree. Whether the stress of the situation has risen to the required height to make regulation necessary is a question of judgment. It is a social judgment, which only the legislature is truly competent to make.[41]

And in all these cases where the existence of virtual monopoly creates a public interest—whether the subject-matter be the distribution of a consumable thing, such as water or gas, or the utilization of a fixed facility, such as a grain-elevator, a cotton-gin, a wharf, or a dock—the situation presents this invariable concomitant, that, unless the public interest be recognized and protected, either the mass of population or some important element of it will stand in a condition of economic helplessness towards those who are the masters of the situation.

In such cases, it is idle to talk about freedom of contract and the right of a man to use his property as he pleases. There is no freedom of contract and the use of the property is not being made by the owner of it. It is the others who must use it. And the permanent needs of society as a whole require that they use it.

The recognition of such conditions of economic dependence lies at the root of practically all the social and industrial legislation of our time.[42] Hopeless economic inferiority negatives freedom of contract just as virtual monopoly negatives free competition. The idea is everywhere the same.

lived, nevertheless, emergency may afford a reason for the exertion for a living power already enjoyed." Wilson *v.* New, 243 U. S. 332, 348.

[41] Price *v.* Illinois, 238 U. S. 446, 451.

[42] Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 20; Mullen *v.* Oregon, 208 U. S. 412, 422; Erie R. Co. *v.* Williams, 233 U. S. 671, 704. Cf. DICEY, LAW AND OPINION IN ENGLAND, pp. 261, 265. Pound, "Liberty of Contract", 18 YALE L. JOURN., 454, 471, 482.

> "It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain-elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power." [43]

There is, and in the nature of things, can be no other way of ascertaining the existence of a public interest demanding, and therefore legally justifying, public regulation and control.

The Actual Conditions in the Larger Cities.

It cannot be doubted that the housing situation in the larger cities presents all of these features. There is a house shortage which amounts substantially to a fixed and inelastic limitation of supply. The demand, on the other hand, is intensified and rendered acute by the rapid increase in population, the conversion of residence into business property and the reduction and even cessation of building operations both during the war and after. This intense demand, however, is an emergency demand. The present expansion is regarded as more or less temporary and subject to sudden and (economically speaking) unforseeable change. The increased demand for housing, therefore, is not sufficiently stable and permanent to bring into play the private enterprise which would ordinarily respond by increased construction. The result of this is that the bidding is all on one side. The price is not fixed by the "higgling of the market". There is no competition between those who among them control the only available supply of habitation-space. *In short, so far*

[43] German All. Ins. Co. *v.* Kansas, 233 U. S. 389, 417.

as the housing situation is concerned, the normal competitive system has completely broken down. It is as truly non-existent as in the business of furnishing transportation, water, gas, electric light and other facilities which are universally recognized as proper objects of public regulation. By reason of the rigid limitation of supply in the face of a sudden, intense and imperative demand, the renting of buildings in many of the large cities presents a state of virtual monopoly.

Such conditions necessarily bring in their train the habitual evils of monopoly—arbitrary enhancement of prices, consequent lowering of the standard of living in other directions, overcrowding dangerous to the public health, individual instances of intolerable extortion and oppression resulting in marked inequality of living conditions—in a word, a general disorganization of the economic life of the community. The circumstances obviously required a new application of the principle upon which the common law has never failed to regulate, in the public interest, whatever forms of business or uses of property have come to affect, in a vital manner, the indispensable conditions of normal civilized life.

Recognition of Conditions by Other Legislatures.

In noting these conditions with a view to observing how far they support the reasonableness of the conclusion reached by Congress with respect to the District, it is neither possible nor advisable to put out of mind the fact that other responsible legislatures have reached the same conclusion with respect to the congested section of their territory.

Should we find the legislatures of all the States having large centers of population in substantial agreement with respect to a public interest having been created by the prevailing housing conditions, it would require much courage still to insist upon the essential irrationality of that view. We do not, indeed, find any such universal unanimity at the present time. But the present acute conditions is relatively new. It is one of the results of the war with which legislatures are only beginning to

grapple. Manifestly, somebody must take the first step. That so many agree in it is strong evidence of its soundness.[44]

When, for example, we find the New York Assembly recognizing that a public emergency exists in the large cities of that State owing to the exaction of unreasonable and oppressive rent agreements under conditions "whereby freedom of contract is impaired and the public welfare, health and morals endangered",[45] it is not easy to say that Congress was simply mistaken in declaring a similar situation to exist in the District of Columbia. And when we see the same legislature so impressed with the present economic helplessness of tenants that it deems it necessary to make the wilful violation of a stipulation to furnish water, heat, light or other similar customary services, a misdemeanor,[46] we are less confident in affirming the relation of landlord and tenant to be a matter of purely private contract, which the State has no business to treat as affected with a public interest.

The same effect is produced when we discover the Wisconsin Legislature recognizing in its congested centers a similar "public emergency growing out of the world war", declaring unlawful "every unreasonable or unjust rent, charge or other term or condition for the use" of rental property in those localities, and empowering its Railroad Commission to determine such "as shall be reasonable and just".

And when we find the hardheaded people of Maine prescribing through their legislature severe penalties for anyone who demands or collects unreasonable or unjust rents * * * or imposes unreasonable or unjust terms or conditions for the occupancy of any building rented for dwelling purposes",[47] we find it no longer possible to dismiss the matter by saying, "Here is another unreasonable legislature."

With the wisdom of all this legislation, we, of course, have

[44] Noble *v.* Haskell, 219 U. S. 104, 112; Tanner *v.* Little, 240 U. S. 369, 385-6.

[45] Acts of 1920, Chap. 136.

[46] Acts of 1920, Chap. 131.

[47] The Maine Act is entitled: "An act to prevent profiteering in the necessities of life and rents or charges for the occupancy of buildings for dwelling purposes and to provide penalties therefore and investigations thereof."

nothing to do.[48] What we are concerned with is the practically universal popular conviction that the housing situation is intolerable and that it transcends the mere private interest of the parties and affects the community at large. The law-making bodies of several important States, as well as Congress legislating for the District, share that conviction. Under such circumstances it seems impossible to say that emergency legislation which recognizes that public interest and seeks to protect it is basically irrational and void.[49]

Unique Situation of the District of Columbia.

Conditions evident in other congested centers of population are intensified in the District of Columbia because of the special relation in which this community stands to the Federal Government. This is not to intimate that Congress, in the exercise of legislative power over the Federal District, is free from any otherwise relevant constitutional limitation, or that

[48] Chicago, B. & R. Co. *v.* McGuire, 219 U. S. 549, 569. Whether the regulation of rental charges by public authority will stabilize conditions to a degree that will cause capital to flow into a new construction and thus ultimately overcome the acute house shortage which is the cause of the evil, is a question of political judgment with which courts and lawyers, as such, are not concerned. For an admirable statement of the economic arguments against regulation, see THE WEEKLY REVIEW, New York, for August 25, 1920.

Recognition of this legislative power should not alarm even those who profoundly disbelieve in the efficiency of such remedies. Possession of a power is never evidence of the wisdom of exercising it. The consensus of opinion that there is an immediate need for the exercise of such a power does, indeed, testify to the fact of a public interest which demonstrates the existence of the power. But there is no occasion for believing that regulation of rents will become a permanent legislative policy. In all of the statutes referred to, stress is laid upon the fact that the legislation is emergency legislation designed to meet a condition due to the economic disorganization produced by the war.

[49] "It being incumbent upon the opponents of the law to demonstrate that it is clearly unreasonable and arbitrary, it is sufficient for us to declare, as we do, that such reasoning would be pertinent to the subject and not so unfounded or irrational as to permit us to say that the State, if it accepted it as a basis for changing the law in a matter so closely related to the public welfare, exceeded the restrictions placed upon its action by the Fourteenth Amendment." Arizona Employers' Liability Cases, 250 U. S. 400, 427.

its sovereignty here is in its nature more ample than that possessed by one of the States in respect of persons and property within its territory. It is but the recognition of the capital fact that the District is a specialized area set apart primarily for the uses of Government. It is but a tiny space and yet it is the constitutional seat of Government of an immense empire. That fact does not change the law. But it gives to matters of population, housing and other ordinary economic relations a significance which they would not have elsewhere. The "Government at Washington" must live, and it must live at Washington.

Whenever Government is forced, as it was forced by the exigencies of the war, to concentrate in this limited area a vast army of civil employees out of proportion to the District's permanent population and beyond the expectation of any normal increase, such a great and sudden influx of population necessarily places the whole body of civil employees at the mercy of those who possess the available facilities for shelter and habitation. The tempting rise in rents thereby occasioned imperils the security of all employees who do not happen to be protected by long leases. On the other hand, the newcomers, whose services are equally necessary to the government, are confronted with the alternative of declining to come or of bidding against one another to the point where the proportion of income required for shelter threatens seriously to reduce the amount left for the other necessaries of life. It is a matter of common knowledge that the high rents paid by war-workers resulted in conditions of overcrowding dangerous to health, and during the influenza epidemic, even to life. The obvious result of such a situation here is an immense dislocation which impairs, and may even imperil, the success of the administrative mobilization upon which may depend the very safety of the country.

Can it be denied that such special and peculiar circumstances, operating in this specialized area of rigid limits, may impart an exceptional character to the business of supplying facilities for shelter and habitation, and so to the ordinary relation of landlord and tenant? And does not this exceptional character at

once remove all such relations out of the category of those whose substantial effects are assumed to be limited to the immediate parties? It is not plain that, from the view-point of a legislature charged with the general well-being and security, these ultimate and secondary effects, if they do not wholly transcend the immediate effects, at least create such a public interest in the relation as warrants regulation for the common good?

Juristically speaking, exceptional social circumstances are more significant than exceptional physical circumstances. Surely circumstances such as Congress deems to exist here are fully as significant as those physical circumstances which have caused legislatures, and the highest courts as well, to recognize in the arid States of the West the public character of uses which would elsewhere be confessedly private.

To these considerations may perhaps be added the fact that the sudden increase in use-value accruing to the owners of real estate in the District of Columbia is a socially created value, resulting exclusively from the concentration of the Government's war activities within the limited area of the Federal District. It is not suggested, of course, that the origin of this increment justifies its confiscation. But it is submitted that it may be fairly considered among the reasons which justify its regulation as a means of doing justice as between owner and owner, as well as between owner and tenant. The new value which society has here produced to the advantage of all who possess property susceptible of being used to supply the demand for habitation, ought not to be unfairly and inequitably absorbed by such owners only as happen to be free from scruple. Profiteering, after all, is a practice which, for various social reasons, will not be indulged in by all classes of owners. Absence of regulations means gross inequality in the distribution of the total increment created by the new situation of and the unjust enrichment of the new unscrupulous owners for whom "the sky is the limit". If there were no other reason for a Rents Law, it might well be justified by its effect in equalizing the benefits of an extraordinary situation as among the owners themselves.

II. Regulation and Due Process.

Assuming the existence of the power to regulate, our next inquiry is whether the provisions for the execution of the power are in conflict with the requirements of due process. The discussion under this head need not be extended. For practically all the adverse suggestions are foreclosed by familiar decisions.

In the first place, it is elementary that, where the power to regulate exists, the legislature, after laying down the standard of reasonableness, may confide its application to a quasi-administrative tribunal.[50] That is precisely what the District Rents Act does. It declares that all rents and charges for the rental property affected by the act, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof, shall be fair and reasonable. All unreasonable or unfair provisions in that regard are declared to be contrary to public policy.[51] It then sets up a Commission, composed of three persons, to determine fair and reasonable rentals.

Unless there is something inherently wrong with the standard fixed by the legislature,[52] the validity of each application of the standard made by such a tribunal is to be determined upon a consideration of the effect of the rate fixed upon the return received from the capital employed. No one has a right to complain of the determination, who is not prepared to show that the rate fixed in his case is confiscatory in that it takes his property by depriving him of a reasonable return on the fair value thereof.[53]

In the consideration of that question, the determination of an impartial administrative tribunal clothed with the requisite powers is regarded as *prima facie* reasonable, provided, of course, that it be the result of proceedings not wanting in due process. The prime requisite is notice and hearing.[54] In the

[50] Railroad Commission Cases, 116 U. S. 307, 336; Interstate Commerce Comm. *v.* R. Co., 167 U. S. 479, 494; Louisville, etc., R. Co. *v.* Garrett, 231 U. S. 298, 305.

[51] Sec. 105.

[52] Nash *v.* United States, 229 U. S. 373, 377; United States *v.* Rosenbaum, 264 Fed. 578, 582.

[53] Missouri Rate Cases, 230 U. S. 474, 508.

[54] Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 458, 459.

institution of the Rent Commission, this requirement seems to have been safeguarded in the most scrupulous manner. While the Commission is authorized to determine reasonable rent on its own initiative as well as upon the application of the parties,[55] it can exercise its power in that regard only after adequate notice, either "personally or by registered mail" to all parties in interest.[56] An open public hearing is required in that instance as in all other cases.[57] Full opportunity is accorded the parties to adduce whatever testimony they may consider relevant. For that purpose, the Commission has full power "to require by subpœna the attendance and testimony of witnesses and the production of books".[58] They may be represented by counsel and have full privilege of cross-examination. Unless there be an unrestricted right to contract at pleasure for the exchange of the use of real property for a money consideration free from all possibility of legislative regulation, it must be conceded, we think, that none of the detailed provisions of this statute are lacking in any element of due process.

Having in mind the need of a guiding hand for every administrative tribunal, and also, perhaps, the principle that whether a rate fixed by such tribunal operates to deprive an owner of his property without just compensation presents a judicial question, in respect of which he is entitled to the determination of a regular court of justice,[59] the statute provides for a direct appeal from every determination of the Commission to the Court of Appeals.[60] On such an appeal, the Court is free to review, modify or reverse the Commission's determination for "error of law." Thus parties are fully protected in respect of the procedure of the Commission in receiving or refusing to receive evidence and the other elements of a fair and adequate hearing.

Since the *Court* is given power to permit *additional evidence* to be adduced whenever reasonable grounds are shown for failure to adduce it below,[61] there is an apparent intention that it

[55] Sec. 106.
[56] Sec. 106.
[57] Sec. 106.
[58] Sec. 105.
[59] Reagan *v.* Farmers L. & T. Co., 154 U. S. 362, 399; Louisville, etc., R. Co. *v.* Garrett, 231 U. S. 298, 311.
[60] Sec. 108.
[61] Sec. 108.

should consider the proofs in so far as they tend to show that the Commission's conclusions are unsupported or that the rate fixed denies appellant a fair and reasonable return upon his property. The view seems to have been that in such appeals, the court would be exercising judicial functions.[62] But if such be not its power on a direct appeal from the Commission, an owner regarding the rental fixed as confiscatory is manifestly at liberty to seek an injunction against its enforcement.[63]

Criticism has been directed against that provision which allows a tenant to petition for a revision of rent before the expiration of the lease, but does not permit his landlord to do so. The supposed discrimination is more apparent than real. Under the circumstances known to exist during the two years prior to the act, a presumption of the reasonableness of a rent may fairly be said to arise as against the landlord from the fact of his having leased at that figure, whereas the tenant manifestly stood in a markedly inferior position. Is it irrational for the legislature to infer that landlords in general obtained the full benefit of their vastly superior economic position in the rents fixed by them? If not, there is nothing arbitrary in refusing them the privilege of applying for an increase during the term. The legislature is "free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest." [64] "It may hit the evil where it is most felt." [65]

On the other hand, unless the rent contract be one wholly exempt from the power to regulate, Congress has clear authority to permit tenants to apply for a readjustment of extortionate rates to a basis of reasonableness.[66] The exercise of this power is not inhibited because a corresponding privilege is denied to landlords upon a difference in fact, which might rationally

[62] Detroit & M. R. Co. *v.* Comm., 235 U. S. 402, 405.

[63] Prentis *v.* Atl. Coast Line, 211 U. S. 210, 230; Louisville, etc., R. Co. *v.* Garrett, 231 U. S. 298, 311; Oklahoma Op. Co. *v.* Love, 252 U. S. 331, 335, 337.

[64] Miller *v.* Wilson, 236 U. S. 373, 382.

[65] Keokee Consol. Coke Co. *v.* Taylor, 234 U. S. 224, 227.

[66] Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 197.

serve as a basis of classification.[67] When the statute comes to deal with the situation after the expiration of the term and at a time when it is operating to keep the tenant in possession against the will of the landlord and under conditions not contemplated by him, it is no longer possible to draw any such inference *quoad* the landlord, and the legislature accordingly places both parties upon a footing of equality. A provision of this kind, whether good or not, could not possibly work the total invalidity of an act regulating rentals.

If a provision can be so construed as to save the constitutionality of the statute, that course should be adopted. This provision may be construed, if necessary, so as to confine its operation to leases made after the enactment of the law. In that case, it would be considered as incorporated in every subsequent lease. The question would then go not to the owner being deprived of a property right (rent to accrue) resting on contract, but only to an alleged interference with his liberty to contract. But if the power to regulate exists, liberty to contract is not infringed.[68]

It is also possible to construe the provision as throwing open the whole question of the reasonableness of a rent whenever the tenant invokes the jurisdiction of the Commission. Since the power and duty of the Commission is to fix a reasonable rent, a tenant applying for revision in anticipation of a reduction could not complain if the reasonable rent determined by the Commission happened to be more than that fixed by the lease.

But, should we concede that this provision conflicts in some way with the principle of equal protection of the laws, the result is simply to eliminate the provision which permits readjustment of rent *during* the existence of an unexpired term. But how would that affect the other provisions of the act? They are not dependent upon allowing rents to be revised during leases. Congress has been at great pains to make it clear that the diverse

[67] Am. Sugar Ref. Co. *v.* Louisiana, 179 U. S. 89, 92; Booth *v.* Illinois, 184 U. S. 425, 429; McLean *v.* Andrews, 211 U. S. 539, 551, 552; Quong Wing *v.* Kirkendall, 223 U. S. 59, 62-3; Bosley *v.* McLaughlin, 236 U. S. 385, 395; Miller *v.* Wilson, 236 U. S. 373, 382; Miller *v.* Strahl, 239 U. S. 426, 434.

[68] Union Dry Goods Co. *v.* Georgia P. S. Corp., 248 U. S. 372, 374.

operations of the act evidence severable legislative intentions.[69] It has expressly negatived any inference "that it would not have enacted that which is within, independently of that beyond, its power." Had the act been so framed in the first instance as to confine its operation to charges for occupancy after the expiration of existing leases, would it not have been given effect as a complete and self-consistent act? If so, why is it not equally valid when it has the same operation after the elimination of the objectionable clause.[70]

III. The Protection of Possession.

It seems unfortunate that the constitutionality of the District Rents Law should have first come up for consideration in cases presenting, not the power to regulate rental charges, but the power to continue the possession of the tenant. It is in this feature alone that the statute bears any resemblance to the Saulsbury Resolution,[71] which was declared invalid in Wilson *v.* McDonnell.[72] Yet, because of this, the discussion has been somewhat clouded by an initial assumption that the two statutes are really similar, when, in truth, the resemblance between them is purely superficial.

Theory of the Saulsbury Resolution.

The Saulsbury Resolution did not purport to regulate rents. What it did was to declare baldly that the existing possession of a tenant, except in certain exceptional instances, might continue at his option, notwithstanding the expiration of the tenancy. The consideration for the occupancy so continued was not payment of a fair and reasonable rent. It was payment merely of the rent fixed by the expired lease. No matter how long occupancy under the Resolution might continue, it was

[69] Sec. 121.

[70] Vial *v.* Penniman, 103 U. S. 714, 717; Reagan *v.* Farmers' L. & T. Co., 154 U. S. 362, 395, 396; Berea College *v.* Kentucky, 211 U. S. 45, 54; El Paso & N. E. R. Co. *v.* Gutierrez, 215 U. S. 87; 97; Hyde *v.* Southern R. Co., 31 App. D. C. 466, 471.

[71] 40 Stat. 593.

[72] 48 Wash. Law Rep. 6; 265 Fed. 432.

beyond the power of the landlord either to increase the rent or to appeal to any tribunal for relief. Thus, the Saulsbury Resolution, wholly unlike the present law, provided neither for regulating rents on the basis of reasonableness, nor for continuance of possession conditional upon fair and reasonable compensation. Under those circumstances, it could be well argued that it operated to cut down, at the tenant's option, the landlord's reversionary interest by postponing until the conclusion of a treaty of peace his right to re-enter and repossess himself of his premises. For this transfer of an admitted and valuable right of property, the Resolution provided no consideration. For there was no presumption either of law or fact that rent fixed under wholly dissimilar circumstances for a term already past would be fair and reasonable for a subsequent and indefinite occupancy owing its existence solely to the Resolution itself. Upon this view, the Resolution deprived the owner of his property without compensation. The District Court of Appeals also pointed out that the Resolution discriminated in favor of owners of property unoccupied at the Resolution, or built or completed thereafter, since it was permissible for them "to exact whatever rentals tenants would agree to pay" and these would probably be substantially more than those paid by tenants in possession of like property. The Court's conclusion, therefore, was that "The Resolution before us is unreasonable because its necessary result is the taking of private property without compensation, and it is not uniform in its operation for the reason that it is not impartial within the class subject to its provisions."

Theory of the Rents Act.

The Rents Act proceeds upon an entirely different principle. It declares that rents are subject to the rule of reasonableness, and provides machinery for adjusting them on that basis. Fair and reasonable charges are such as are just and fair to both parties.[73] The rate fixed must in each case constitute a rea-

[73] Spring Valley Water Co. *v.* City of San Francisco, 165 Fed. 667, 679.

sonable return on the fair value of the owner's investment.[73a]

Hence the rent is just compensation for the use and occupancy of which the tenant deprives the owner. Under these circumstances, it is no longer possible to say that the landlord's reversionary interest is taken away. For, if the amount determined by the Commission is reasonable (and the Court will strike down any that is not), then the owner is compensated to the full extent of what he parts with, viz: The use-value of his property as rental property. If he does not wish it to be rental property, he is at liberty to withdraw it from that class.

The two statutes being utterly unlike in principle, as well as in operation, it is manifest that the decision on the Saulsbury Resolution can have no bearing on any act providing for the regulation of rents. "No rates, uniform or otherwise, were prescribed by the Resolution." [74] Nor can the decision on the Resolution have any substantial significance on the question of the continuance of possession under the District Rents Act. For the latter makes such continuance conditional upon payment of reasonable rent, a matter with which the Saulsbury Resolution was not concerned. Thus the questions under the new act are in each aspect new and different questions. The power to regulate rentals can be properly passed upon only in a case which actually presents some action of the Rent Commission in respect of rentals. For, while the power to continue occupancy is dependent upon the power to regulate rents, the converse is not true. The power to regulate rents is not dependent upon the power to continue occupancy. Hence a denial of the latter does not involve a denial of the former.

Protection of Possession in Aid of Regulation.

Coming then to consider directly the question of occupancy, we submit that, if legislative power to regulate rentals be once conceded, one may legitimately infer therefrom an ancillary au-

[73a] Smyth *v.* Ames, 169 U. S. 466, 546; Atlantic C. L. *v.* North Carolina Corp. Comm., 206 U. S. 1, 24, 25; Northern Pac. R. Co. *v.* North Dakota, 236 U. S. 585, 595.

[74] Wilson *v.* McDonnell, *supra.*

thority to protect the possessior of a tenant paying a fair and reasonable rent *until* such time as the landlord withdraws the property from the class of buildings offered for hire. And this, as we have seen, he may do by applying the property to his own use, or that of his family, or by improving it in order to rent again. In other words, the power to protect existing occupancy at a reasonable rental is a corollary of the power to regulate the rental.

The grounds for that conclusion may be summarized thus:

The Rents Act proceeds upon the principle that an owner not using a building but renting it to strangers has dedicated it to a use which, although primarily personal to the tenant, is here impressed with a public interest. The existence of this public interest justifies regulation of the rent. Inasmuch as the amount payable by any new tenant must, like that paid by the former tenant, conform to the same standard of reasonableness, the owner can have no substantial and legtimate reason (other conditions of the tenancy being complied with) for withdrawing the service from one person in order to give it to another, whereas the State has urgent and compelling reasons for preventing the needless disturbance of the population upon which directly or indirectly, it depends for the transaction of the Nation's business. Having power to see that no unjust, unreasonable or unfair rent is exacted, Congress, as an appropriate means of accomplishing that purpose, may insist that the occupancy of one paying a reasonable rent be not disturbed without cause, so long as the owner leaves the property in the rental class.

What just cause of complaint can the owner have? Being in receipt of a reasonable rent, he is fully compensated for the use which he parted with voluntarily and may resume whenever he pleases. Since he is fully protected in respect of all other incidents of occupancy, he can have no possible motive in dispossessing the tenant except the hope of extorting an unreasonable compensation from a new and anxious applicant—the very thing against which the policy of the Rents Law is directed. Thus the protection of possession during payment of

reasonable rent has real and substantial relation to the public object for which the rent itself is regulated.[75]

It is incorrect to say that an owner is powerless, under this law, to withdraw from the public calling, into which he is said to have entered by renting his property.[76] On the contrary, he is entirely free, so far as the statute is concerned, to give up the rental business at any time.

For, manifestly, there is but one way to give up that business. That is to stop renting. Unless an owner has an inherent right to leave his buildings vacant while, in a dearth of housing, other human beings, willing to pay a fair price, go without shelter, one owning houses which he is accustomed to rent can take them out of the rental class only by making use of them himself. As for the other alternative—that is, refusing to permit anybody else to use them—surely, under the existing housing situation, the public right to regulate rents and prevent the complete disorganization of the life of the community will not be denied upon a claim of right so abstract and socially injurious as that. Considering the facts of actual life, the only rational way in which rental property can cease to be such is by substituting use by the owner for use by the tenant, or by withdrawing the property temporarily from use in order to rebuild or improve it. For both of these contingencies, the statute makes due provision. Only if he rents, is the owner subject to the provisions of the act.

The tenant's statutory option to continue in possession at a fair rent not being effective against the owner's right to withdraw the property from the rental class, there remains to consider the mode in which the statute permits the fact of withdrawal to be established. This is by giving thirty days' written notice setting forth the facts constituting a case of withdrawal, that is to say, that the owner desires the property, (a) for actual and *bona fide* occupancy by himself or his family, or (b) for the purpose of tearing down or razing the structure in order immediately to construct new rental property.

[75] Jackson *v.* Massachusetts, 197 U. S. 11; Miller *v.* Wilson, 236 U. S. 373, 380; United States *v.* Ferger, 250 U. S. 199, 203, 205.

[76] Hirsch *v.* Block, *supra.*

Any dispute as to the accuracy or sufficiency of the statement, as to the good faith of such demand, or as to the service of the notice, is to be determined by the Commission.[77] And Sec. 106 makes all determinations of the Commission conclusive on the courts. Whether the legislature may empower a quasi-administrative commission to determine an issue of this character depends, of course, upon the extent to which the organic law stresses the separation of powers.[78]

Authority to determine a reasonable rental implies authority to determine whether the structure is within the class subject to regulation; but, in this aspect of the statute, the question is not one of regulating a rent, but of determining whether a person who has no right to possession, unless the property belongs to a specified class, may hold the owner out of possession until he proves that it does not. For that purpose, the inquiry whether the notice states a case of withdrawal would seem to be an inquiry as to the existence of past or present facts, upon which depends the exercise of an admitted right of property. That is quite different from the fixing of a rate. "The establishment of a rate is the fixing of a rule for the future, and is therefore an act legislative, not judicial, in kind."[79] The ascertainment of the facts for the purpose of possession is not the fixing of a rule for the future. It is an adjudication of an existing state of facts conditioning a right of possession. Where, as for example in Virginia, the Constitution does not rigorously exclude the concentration of different powers of Government in a single board or tribunal, an issue of this character may be committed to a subordinate commission, whose action to that extent partakes of the judicial character.[80] But its determination, of course, cannot be made conclusive, and if such be the true construction of this provision, one cannot es-

[77] Sec. 109.

[78] Norfolk & P., etc., R. Co. *v.* Commonwealth, 103 Va. 289, 294, 295, 49 S. E. 39; Winchester & S. R. Co. *v.* Commonwealth, 106 Va. 264, 267, 55 S. E. 692; Louisville, etc., R. Co. *v.* Garrett, 231 U. S. 298, 304; Detroit & M. R. Co. *v.* Michigan R. Comm., 235 U. S. 402, 404.

[79] Prentis *v.* Atl. Cost Line, 211 U. S. 210, 227; Louisville, etc., R. Co. *v.* Garrett, 231 U. S. 298, 305.

[80] Winchester & S. R. Co. *v.* Commonwealth, 106 Va. 264, 55 S. E. 692.

cape the conclusion that the law-making body has overstepped the line.

But this single feature would not have the effect of avoiding the statute either *in toto* or in respect of the provisions authorizing continuance of occupancy. The legislative will, defining what shall be evidence of withdrawal from the rental class, may be given effect without treating the Commission's determination as conclusive. It may be left, like any other rule of law, to be enforced by the courts. Under the existing law, the landlord is entitled to dispossess the tenant upon the expiration of his tenancy, and is provided with a remedy for that purpose. The new statute, authorizing continuance of possession in consideration of reasonable compensation, annexes a condition to the exercise of the right to repossess. That condition is that the property must be shown not to be within the category subject to regulation and, hence, to continued occupancy. The landlord may not, therefore, avail himself of the remedy unless he establishes the requisite facts before the court authorized to afford the remedy. In short, judicial ascertainment of those facts is a condition precedent to the remedy. Whether we agree that the Commission's determination is *prima* facie only, or whether we deny it any right to act in this matter at all, it ultimately remains for the court to exercise its ordinary function by determining (as the statute requires) whether the notice sufficiently states facts evidencing withdrawal from the rental class, and whether the alleged facts are true. Only in that event can judgment for possession be awarded.

Henry H. Glassie.

WASHINGTON, D. C.